STATE OF MICHIGAN

COURT OF APPEALS

ROY C. JOHNSON, JR., and JULIE JOHNSON,

Plaintiffs-Appellants,

v

ROMP ENTERTAINMENT, INC., d/b/a TONIC NIGHT CLUB,

Defendant/Cross-Plaintiff,

and

RYAN CORNELL and JAMEY BELCHER,

Defendants/Cross-Defendants-Appellees,

and

CHRISTOPHER QUINN,

Defendant/Cross-Defendant.

UNPUBLISHED
August 21, 2008

No. 277388
Oakland Circuit Court
LC No. 2004-059949-NO

ROY C. JOHNSON, JR., and JULIE A. JOHNSON,

Plaintiff-Appellants,

v

ROMP ENTERTAINMENT, INC., d/b/a TONIC NIGHT CLUB, and VLADIMIR MIRKOVICH,

Defendants-Appellees.

No. 277389
Oakland Circuit Court
LC No. 2006-078435-NO

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

In Docket No. 277388, plaintiffs Roy and Julie Johnson appeal as of right, challenging the trial court's order dismissing their negligence claim against defendant Ryan Cornell pursuant to MCR 2.116(C)(10) in LC No. 2004-059949-NO. In Docket No. 277389, the same plaintiffs appeal as of right from an order dismissing their claims against defendants Romp Entertainment, Inc., d/b/a Tonic Night Club ("Tonic"), and Vladimir Mirkovich pursuant to MCR 2.116(C)(7) and (8) in LC No. 2006-078435-NO. We affirm.

Plaintiffs filed two separate lawsuits, both arising from a fight that occurred at the Tonic Night Club in Pontiac in November 2003. After defendant Cornell became involved in a physical altercation with bouncers outside the nightclub, a Pontiac police officer arrived and Cornell was arrested and taken to a police car. The officer then attempted to arrest defendant Jamey Belcher, but she resisted, and then defendant Christopher Quinn became involved and also began to assault the officer. The officer radioed plaintiff Roy Johnson, also a Pontiac police officer, for assistance. Johnson arrived at the scene and was injured in the process of arresting defendant Quinn, who resisted the arrest.

In July 2004, plaintiffs filed a complaint in LC No. 2004-059949-NO, asserting claims for negligence against defendants Tonic, Cornell, Belcher, and Quinn, and a dramshop claim against Tonic. Plaintiff Julie Johnson also brought a claim for loss of consortium. The trial court granted defendant Cornell's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that there was no genuine issue of material fact that his alleged conduct was a cause of plaintiff Roy Johnson's injury. The claims against defendants Belcher and Tonic proceeded to a jury trial and the jury returned a verdict of no cause of action. Plaintiffs stipulated to the dismissal of their claims against defendant Quinn.

In October 2006, plaintiffs filed a second lawsuit in LC No. 2006-078435-NO against defendants Tonic and Vladimir Mirkovich, an alleged owner or agent of Tonic, asserting claims for negligence, gross negligence, and loss of consortium. Plaintiffs alleged that defendant Mirkovich inappropriately touched Belcher inside the Tonic Night Club, which was the impetus for the later altercation and events that occurred outside the nightclub and eventually led to plaintiff Roy Johnson's injuries. The trial court granted defendants' motions for summary disposition under MCR 2.116(C)(7) and (8), concluding that plaintiffs' claims were barred by res judicata, and further, that defendants did not owe a duty of care to plaintiff Roy Johnson.

I. Docket No. 277388

Plaintiffs argue that the trial court erred in dismissing their negligence claim against defendant Cornell pursuant to MCR 2.116(C)(10) in LC No. 2004-059949-NO. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242

Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

"In order to make out a prima facie case of negligence, the plaintiff must prove the four elements of duty, breach of duty, causation, and damages." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). In this case, the trial court determined that there was no genuine issue of fact with regard to causation.

"Proof of causation requires both cause in fact and proximate cause." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). In this case, even if defendant Cornell's conduct could be considered a cause in fact of Johnson's injuries, we agree that there is no genuine issue of material fact regarding proximate cause.

"[L]egal cause or 'proximate' cause normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Specifically:

> Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. [*Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999) (citation omitted).]

"Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

The issue whether another cause is a superseding cause that will relieve a defendant from liability involves an assessment of foreseeability. "[A] defendant will not be liable for an injury caused by an intervening force that was not reasonably foreseeable." *Hickey v Zezulka*, 439 Mich 408, 437; 487 NW2d 106 (1992), superseded on other grounds *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002). But "where the defendant's negligence consists in enhancing the likelihood that the intervening cause will occur, or consists of a failure to protect the plaintiff against the very risk that occurs, it cannot be said that the intervening cause was not reasonably foreseeable." *Id*. at 438 (internal citations omitted).

In this case, it was unforeseeable that Cornell's altercation with the bouncers at the Tonic would lead to the sequence of events that ended with defendant Quinn violently resisting his arrest by Johnson, who did not arrive at the scene until after Cornell had been restrained and taken to a police car. Because Quinn's conduct in resisting arrest was not reasonably foreseeable, and Cornell's actions neither enhanced the likelihood that Quinn would violently resist his arrest, nor constituted a failure to protect Johnson from the assault by Quinn, Quinn's conduct was a superceding cause relieving Cornell of liability for Johnson's injuries.

Accordingly, the trial court did not err in granting defendant Cornell's motion for summary disposition pursuant to MCR 2.116(C)(10) in LC No. 2004-059949-NO.

II. Docket No. 277389

Plaintiffs argue that the trial court erred in dismissing their claims in LC No. 2006-078435-NO on the basis of both res judicata and its determination that defendants Tonic and Mirkovich did not owe plaintiff Roy Johnson a duty of care. We disagree.

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by res judicata. In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor, unless contradicted by any affidavits, pleadings, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The applicability of a legal doctrine, such as res judicata, is a question of law, which this Court reviews de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

"Summary disposition of a negligence claim is properly granted pursuant to MCR 2.116(C)(8) if it is determined that, as a matter of law, the defendant owed no duty to the plaintiff." *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000). As explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998),

> [a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. [Citations omitted.]

In *Washington*, *supra* at 418, the Court explained the doctrine of res judicata as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [Citations omitted.]

In this case, defendant Tonic was a party to the first action. Moreover, the issue of Tonic's respondeat superior liability for its owners' alleged negligence was decided on the merits in the first action. In that case, the trial court denied plaintiffs' motion to amend their complaint to allege such a claim based on futility. That decision was in effect a determination that the proposed added claim was substantively without merit, and is entitled to res judicata effect. *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 384; 319 NW2d 352 (1982).

For similar reasons, plaintiffs' claims against defendant Mirkovich are also barred by res judicata. In the former action, the trial court concluded that the person who allegedly assaulted Belcher inside the nightclub (then believed to be another owner) could not be liable in negligence for Roy Johnson's later injuries sustained during his arrest of Quinn due to lack of proximate cause. Although Mirkovich was not a party to the first action, he was in sufficient privity with Tonic to warrant the application of res judicata. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Washington, supra* at 421 (citation omitted). "Privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee, supra* at 553-554 (citation omitted). In this case, Tonic and Mirkovich are in privity because Tonic presented and protected the Mirkovich's interest in the first action.

Moreover, the trial court properly dismissed the claims because defendants Tonic and Mirkovich did not owe a duty to plaintiff Roy Johnson. "'Duty' is defined as the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury." *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). "Before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable." *In re Certified Question*, 479 Mich 498, 509; 740 NW2d 206 (2007).

When a plaintiff is injured by a third party, the plaintiff is required to show the existence of a special relationship to impose a duty. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). A special relationship exists if the plaintiff had entrusted himself to the protection and control of the defendant and, in so doing, lost the ability to protect himself. *Doe v Young Marines of the Marine Corps League*, 277 Mich App 391, 401-402; 745 NW2d 168 (2007).

In this case, there was no relationship at all between the parties, which alone shows that no duty was owed. Moreover, it was unforeseeable that defendant Mirkovich's alleged conduct of inappropriately touching Belcher inside the nighclub would lead to Quinn's subsequent assault of plaintiff Roy Johnson outside the club. Indeed, as a general rule, criminal acts of third parties are unforeseeable. *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002). Under the circumstances, defendants Tonic and Mirkovich did not owe a legal duty of care to plaintiff Roy Johnson. Thus, the trial court properly dismissed their claims for negligence and gross negligence.

Finally, plaintiffs assert that the trial court erred in dismissing their claim for gross negligence, because such a claim is expressly authorized by the statutory firefighters' rule, MCL 600.2967. Although the statute permits a safety officer to bring an action to recover damages for injuries arising from the normal inherent and foreseeable risks of the officer's profession if the injuries arise from a person's grossly negligent conduct, plaintiffs must still establish the

existence of a legal duty of care. Plaintiffs failed to do so with respect to defendants Tonic and Mirkovich and, therefore, the gross negligence claim was properly dismissed.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot